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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

## No. 178

R. MILO GILBERT,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITIONER'S OPENING BRIEF

ALBERT A. DORN
5710 W. Manchester Avenue
Los Angeles 45, California

WIRIN, RISSMAN, OKRAND & POSNER
FRED OKRAND
257 South Spring Street
Los Angeles 12, California

*Attorneys for Petitioner*

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# IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA.

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## PETITIONER'S OPENING BRIEF

### Opinions Below

Trial in the District Court was by jury.

The opinion of the court below (R. 108) and on petition for rehearing (R. 127) are reported at 291 F. 2d 586 and 597, respectively.

### Grounds on Which the Jurisdiction of This Court Is Invoked

The judgment of the Court of Appeals was filed and entered on March 30, 1961 (R. 126).

Timely filed petition for rehearing was denied on May 19, 1961 (R. 129).

The petition for writ of certiorari was filed on June 19, 1961, June 18 being a Sunday.

Certiorari was granted on October 9, 1961.

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 USC 1254(1), Rule 22(2) of this Court and Rule 37(b), Federal Rules of Criminal Procedure.

## Constitutional Provisions and Statute Involved

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

18 USC 495 (62 Stat. 711):

> "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> "Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
>
> "Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
>
> "Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

## Questions Presented for Review

1. Is it a denial of due process of law for one to be convicted of forgery of government refund checks and that conviction affirmed on a theory that the checks were received by the defendant as a part of the filing of fraudulent income tax returns when there was no charge or evidence that the income tax returns were fraudulent and where the income tax returns were not introduced in evidence at all and in face of the fact that the payees of the checks had signed a written power of attorney which gave the defendant *in haec verba* the right to endorse and collect the checks?

2. Is it forgery within the meaning of 18 USC 495 when the endorsement of the check shows on its face that the signer does not purport to be signing the signature of the payees but rather that he is signing their names by himself as trustee?

## Statement of the Case

The indictment (R. 1-16) was in 35 counts, some of which (1 through 11 [R. 1-7] and 23 through 35 [R. 11-16]) charged violation of 26 USC 7206(2), others (12 through 17 [R. 7-9] and 21 and 22 [R. 11]) charged violation of 18 USC 495 and still others (18 through 20 [R. 9-10]) charged violation of 18 USC 1001. The jury found petitioner not guilty on counts 1, 2, 3 and 35 (R. 21-22) and guilty on counts 4 through 34 (*ibid.*). The court below reversed and remanded as to counts 4 through 20 and 23 through 34 (R. 126) and affirmed as to counts 21 and 22 (*ibid.*). Only the judgment as to counts 21 and 22 are involved in the writ before this Court.

Counts 21 and 22 (R. 11) charge that "(o)n or about June 2, 1958, . . . the defendant R. Milo Gilbert knowingly and wilfully[1] forged on (two) United States Treasury check(s) . . . in the amount(s) of ($848.11 and $556.04, respectively) the endorsement(s) and signature(s) of the payees, Daniel H. and Chalrene (sic) R. Bartfield, for the purpose of obtaining and receiving said amount(s) from the United States, its officers and agents."

This called into play only the first paragraph of 18 USC 495 and only that portion thereof which proscribes forgery.[2]

The Government's entire case on Counts 21 and 22, including cross-examination, covers but twelve and one-half pages of the 1172 pages of Reporter's Transcript. It appears in the printed record from pages 41 through 50. It consists of the testimony of Mr. Daniel Bartfield (R. 41-46), Mrs. Charlene Bartfield (R. 46-49) and two exhibits, Nos. 31 and 32 (R. 50, 83, 87). During Mr. Bartfield's cross-examination, defendant's Exhibit M (R. 106-107) was likewise admitted into evidence (R. 44).

Exhibits 31 (R. 50, 83) and 32 (R. 50, 87) are the two checks in question. They show on their front sides that they are made payable to

"DANIEL H & CHARLENE R BARTFIELD
"c/o R MILO GILBERT"[3]

---

[1] There was no allegation of falsity as seemingly required by 18 USC 495.

[2] As distinguished from "mak(ing), alter(ing) or counterfeit(ing)". And compare Counts 15, 16 and 17 which charge under the third paragraph of section 495 (R. 8-9).

[3] On Exhibit 32, Charlene is spelled Cha*l*rene, and Milo is spelled Mil*e*.

and on their reverse sides that they are endorsed

"Daniel H Bartfield
"Charlene R Bartfield
'R Milo Gilbert, Trustee" '

Exhibit M (R. 44, 106-107) is a special power of attorney admittedly signed by Mr. Bartfield (R. 44, 45) and by Mrs. Bartfield (R. 44, 48) making petitioner their "true and lawful attorney for (them) and in (their) name, place and stead and for (their) use and benefit: (a) For all matters

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'The pictures of Exhibits 31 and 32 appearing in the printed record (R. 83, 87) are not pictures of the actual exhibits. They are pictures of copies obtained from the Treasury Agent at Los Angeles when the actual exhibits were not found by the Clerk of this Court among the exhibits transferred to this Court by the Clerk of the Court of Appeals. See telegram dated November 9, 1961 from the Clerk of this Court to petitioner's counsel, letter dated Nov. 17, 1961 from petitioner's counsel to the Clerk of this Court, letter dated Nov. 28, 1961 from the Clerk of the Court below to the Clerk of this Court, letter dated Dec. 1, 1961 from the Clerk of this Court to petitioner's counsel, letter dated Jan. 16, 1962 from petitioner's counsel to the Clerk of this Court, letter dated Jan. 19, 1962 from the Clerk of this Court to petitioner's counsel. As will be noted the word "by" does not appear in front of the name of R. Milo Gilbert in the picture as was set forth in Question 2 of the petition for writ of certiorari (pg. 3) and considered to have been the case in the body thereof (pg. 4). As the Argument below will show, this does not alter the legal question involved, for even without the word "by", the endorsements, especially in the light of the way the payee portions on the front side of the checks are made out, still show that Gilbert was the person who was signing and there was no pretense that anyone's signature was being duplicated. Nor does this alter the case factually because all through the case the parties viewed the endorsement as "Bartfields by Gilbert, Trustee". This was so in the trial court by the Court (R. 63, 64) and counsel (R. 20, 63; Original Reporter's Tr. 983 [not reproduced in the printed record because at the time of the designation, the instant problem was not known to exist]), in the court below by the Court (R. 115) and Counsel (Appellant's Open. Br. 45; Government's Br. 23) and in this Court (Petition, pp. 3 and 4; Govt's Br. in Opposition, 3) until receipt of the printed record with the pictures therein as explained above.

pertaining to (their) . . . Income Taxes and Tax Returns for the Calendar years 1954 to 1957 inclusive. This includes . . . the filing of necessary refund claims; and the receiving, depositing, endorsing and otherwise negotiating such refund checks at his sole discretion, including the right of offset."

It was stipulated that the endorsements were by petitioner and not by the Bartfields (R. 43, 47).

Acknowledging that the signature on the power of attorney was his (R. 44, 45), Mr. Bartfield also testified that he had not authorized petitioner to sign his name or endorse the checks, that he had not appointed, nor was, petitioner his trustee (R. 43), that he does not remember signing the power of attorney nor petitioner having asked him to do so (R. 45), and that he did not appear before a Notary Public and take oath that he had executed the power of attorney (*ibid*. Mrs. Bartfield testified in similar vein (R. 47, 48, 49) and likewise acknowledged that the signature on the power of attorney was her own (R. 48).

On this evidence the jury convicted of forgery and, as seen, the court below affirmed.

The trial court refused (R. 66, 76) to give the instructions requested by petitioner (R. 20) to the effect that

> "*One who* executes an instrument purporting on its face to be executed by him as agent of a principal named therein, when in fact he has no authority from such principal to execute said instrument, is not guilty of forgery."[5]

[5] The printed record (R. 20) reads "*for* such principal etc." This is a typographical error. The original reads "*from* such principal etc." (Clerk's Tr. 166).

and

> "A check endorsed as follows—name of payee by other as trustee, does not constitute a forged instrument under U.S.C. Title 18, Section 495."

The refusal was appropriately objected to (R. 76).

## Summary of Argument

1. Petitioner was charged with forgery of the endorsements on two Government checks. The checks were payable to "Daniel H and Charlene R Bartfield c/o R Milo Gilbert". The endorsements were "Daniel H Bartfield Charlene R Bartfield R Milo Gilbert, Trustee" or "Daniel H Bartfield Charlene R Bartfield by R Milo Gilbert, Trustee". The endorsements show on their face and petitioner stipulated that the handwriting of all three names was that of petitioner. Under these circumstances the crime of forgery was not committed. Even if petitioner did not have authority to sign the Bartfield names, a proposition petitioner stoutly disputes, there was no forgery because there was no pretense, no covering up, no palming off nor attempt to have the Bartfield names considered as having been signed by the Bartfields, it being clear that petitioner wrote those names. Accordingly, if any crime was committed, it was not forgery. At the most it would be a false representation of authority to sign; this is not forgery.

2. There was no evidence nor even contention by the Government that the checks were not proper refund checks, nor that the Bartfields were not entitled to the money the checks represented nor that petitioner got the money nor that if petitioner did get the money, he was not entitled thereto. The two counts involving these checks were caught up in a trial involving a multitude of other counts most

of which charged the preparation of false and fraudulent income tax returns, but there was no charge either by way of a count or counts in the indictment and no evidence of any kind that any Bartfield returns were falsely or fraudulently prepared. Nevertheless, the Court below, even in the face of a power of attorney admittedly signed by the Bartfields, though they did not remember signing it, sustained the conviction "in view of the substantial evidence to support the fraudulent returns which were the basis of the refunds which resulted in the issuance of the checks upon which Counts 21 and 22 were based." There is simply no evidence in the record to that effect. Indeed, the returns to which the court was apparently referring were not even introduced into evidence nor was there any evidence, even though the returns were not introduced, that they were not correct. Accordingly, petitioner's conviction was sustained in the face of a complete absence of evidence and on the basis of a charge not even made. This is more, therefore, than simply there not being substantial evidence to support a conviction; this is a denial to petitioner of due process of law.

## ARGUMENT

### I

### It Is Not Forgery Under 18 USC 495 When the Instrument Shows on Its Face That the Signer Does Not Purport to Be Signing the Signature of Another Person But Is Acting as Agent or Trustee.

Petitioner was convicted of *forgery* although anyone by merely looking at the endorsement could at once see that the signer was not purporting to falsify another person's signature, but that he was telling the whole world that he, R. Milo Gilbert, was the person who was signing. There is no pretense that anyone's signature was being duplicated. This is especially clear when one examines the face of the checks (R. 50, 83, 87), they being payable to "Daniel H & Charlene R Bartfield c/o R Milo Gilbert".

Under these circumstances, the law is and should be that no *forgery* is committed.[6] The principle is thus stated in 37 CJS, Forgery, §8, page 38:

> "An agent may commit forgery by signing an instrument in disobedience of his instructions or in improper exercise of authority, but one who executes an instrument purporting on its face to be executed by him as an agent, when in fact he has no authority to execute such instrument, is not guilty of forgery."[7]

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[6] Whether, assuming the requisite knowledge and intent, some other offense is committed, is beside the point. One cannot be charged with one offense and be found guilty of another (*Cole* v. *Arkansas*, 333 U.S. 196; *Stirone* v. *United States*, 361 U.S. 212).

[7] It will be noted that this rule is precisely in accordance with the instructions requested by petitioner (R. 20), but refused by the trial court (R. 66). 23 Am. Jur., Forgery, § 10, page 680, is in accord.

The overwhelming weight of authority, both State and Federal, from the very earliest to just last year, supports this rule of law.

a. Federal Cases

*In re Tully*, 20 Fed. 812 (SD NY 1884), held that a check signed "per pro. the Preston Bank Company; G. T. Tully, submanager." was not a forgery whether Tully had authority to draw such a check or not because (pg. 815) "the signature by him in his own name 'per procuration,' etc. showed on its face all that it purported to be." The court found this to be the English law and referred to two English cases, *Regina* v. *White*, 2 Car. & K. 404 and *Charles Windsor*, 6 Bert & S. 522. From the latter the court quotes (pg. 817) from the opinion of Cockburn, C.J.:

> "'. . . We must take the term "forgery" in the extradition act to mean that which by universal acceptation it is understood to mean, namely the making or altering a writing so as to make the writing or alteration purport to be the act of some other person, while it is not.'"

and from the opinion of Blackburn, J.:

> "'Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person; telling a lie does not become forgery because it is reduced to writing.'"

In *International Finance Corporation* v. *People's Bank of Keyser*, 27 F. 2d 523 (ND W Va 1928), affd. 30 F. 2d 46 (CCA 4 1929), cert. den. 279 U.S. 858, a certificate of deposit was issued and signed "T. D. Leps, Cashier". The court held that this was not forgery, saying (pg. 526):

". . . There was no false making of the certificate of deposit by another than the person who purported to sign it. Leps, the cashier, made it. It is admitted that the signature to the certificate of deposit is that of Leps, cashier, the man who purported to sign the instrument, and that he was actually the cashier of the defendant bank, as the certificate of deposit stated he was. Thus 'the wrong done, where such an instrument is made without authority consists in the false assumption of authority to bind another, and not in making a counterfeit or false paper' (not a forgery)."

In *Greathouse* v. *United States*, 170 F. 2d 512 (CA 4 1948), checks were signed, in the presence of the bank cashier, "Woodruff Motor Sale Inc., J. W. Greathouse". Holding that this was not forgery, the court said (pg. 514):

". . . It is well established that forgery contemplates a writing which falsely purports to be the writing of another person than the actual maker. . . . (I)f the writing purports or is known to be the writing of the defendant, it is not forgery for him to sign the name of another although he signs without the other's knowledge or consent under the false pretense that he had authority to do so; . . ."[5]

In *Torrance National Bank* v. *Aetna Casualty & Surety Co.*, 150 F. Supp. 638, 639 (SD Cal 1957), affd. 251 F. 2d 666 (CA 9 1958), a diversity case, the court, in response to plaintiff's argument (pg. 639) "that the unauthorized signing by an agent of his own name as agent constitutes a 'forgery'," held that *People* v. *Bendit*, 111 Cal. 274, 43

[5] The correctness of the *Greathouse* decision was affirmed by the Fourth Circuit in a later decision, *Cunningham* v. *United States*, 272 F. 2d 791, 793-794 (CA 4 1959) and followed by the Third Circuit in *United States* v. *Carabasi*, 292 F. 2d 362, 364 (1961).

P. 901, was the law of California and early had (pg. 640) "unequivocally articulated the law to be that an instrument signed by the one purporting to have executed it is not a 'forgery'."

Aside from *United States* v. *Carabasi*, 292 F. 2d 362, *supra*, fn. 8, the latest Federal case on the subject appears to be *Selvidge* v. *United States*, 290 F. 894 (CA 10) decided May 10, 1961, subsequent to the decision herein by the court below on the merits, but one week before the denial of the petition for rehearing. There, the endorsement was the company's name by means of a rubber stamp and then in handwriting, "By Thelma L. Selvidge". Reversing the conviction, the Tenth Circuit said (pg. 895):

> ". . . It is a rule of general application that an agent may commit forgery by making or signing an instrument in disobedience of his instructions or by exceeding his authority. But when she added her genuine signature purporting to endorse the checks as the agent of her named principal, although she had no authority to do so, she was not guilty of forgery. The endorsements were precisely what they purported to be; the wrongful act being a false pretense or false representation of authority. . . . "

b. State Cases

The state court cases are overwhelmingly in accord with petitioner's contention. The following listing will demonstrate.

California

*People* v. *Bendit*, 111 Cal. 274, 43 Pac. 901 (1896). The writing there was signed "Wm. Cluff & Co. A.B." The court held there was no forgery, saying (111 Cal. at 276):

> "It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely *purports to be the writing of another*. The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. . . ." (Italics in original.)

The correctness of the *Bendit* case was affirmed by the California appellate court as recently as 1955 in *Pasadena Investment Co.* v. *Peerless Cas. Co.*, 132 Cal. App. 2d 328, 331, 282 P. 2d 124.[9]

GEORGIA

*Barron* v. *State*, 12 Ga. App. 342, 77 S.E. 214 (1913) ("W. R. Amason, per W.H.B.").

*Samples* v. *Milton County Bank*, 34 Ga. App. 248, 129 S.E. 170 (1925) "Mrs. N.B. Samples, by N.B. Samples").

Cf. *Morgan* v. *State*, 77 Ga. App. 164, 48 S.E. 2d 115 (1948) (false oral representation of authority to sign father's name on check which was done in the presence of the cashier. HELD: Not forgery).

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[9] *Bendit* was likewise followed by the United States District Court for the Southern District of California as representing the California law in *Torrance Natl. Bank* v. *The Aetna Casualty & Surety Co.*, 150 F. Supp. 638, 640 (1957), *supra*, affd. 251 F. 2d 666 (CA 9 1958).

LOUISIANA

*State* v. *Taylor*, 46 La. Ann. 1332, 16 So. 190 (1894) (Defendant signed the names of a number of persons to a note and then wrote, "I was authorized to sign the above names, I secured the order. E.R. Taylor." Held: Not forgery).

MASSACHUSETTS

*Commonwealth* v. *Baldwin*, 11 Gray (77 Mass.) 197, 71 Am. Dec. 703 (1858) (note signed "Schauler, Baldwin & Co." the payee knowing that the defendant had so signed and believing him to be a partner in the firm. Held: Not forgery. [Pg. 198]: "to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it.")

MINNESOTA

*State* v. *Wilson*, 28 Minn. 52, 9 N.W. 28 (1881) (Deed was signed "James D. Hoitt, by H.H. Wilson, his attorney in fact." Held: Not forgery [9 NW at 30]: "if a person sign an instrument with his own name per procuration of the party whom he intends or pretends to represent, it is no forgery, it is no *false making* of the instrument, but merely a false assumption of authority.") (Italics in original.)

MISSOURI

*State* v. *Kinder*, 315 Mo. 1314, 290 S.W. 130 (1926) (Check was made payable to the order of C. T. Kinder and signed "Samuel Fowler by Kinder." Held: No forgery; the motion to quash the information should have been sustained.)

NEBRASKA

*Goucher* v. *State*, 113 Neb. 352, 204 N.W. 967 (1925) (without authority the County Clerk signed and had approved a warrant for a bill which did not exist. Held: No forgery. [Pg. 968]: "The words 'whoever falsely makes' generally apply to the false making of the writing as distinguished from the contents of the instrument itself.")

NEW YORK

*People* v. *Mann*, 75 N.Y. 484, 31 Am. Rep. 482 (1878) (To the same effect as *Goucher* v. *State*, 113 Neb. 352, 204 NW 967, *supra*).

NORTH CAROLINA

*State* v. *Lamb*, 198 N.C. 423, 152 S.E. 154 (1930) (check endorsed: "M.P. Mitchell, R.W. Lamb", receipt given by Lamb when he cashed the check was: "M.P. Mitchell by R.W. Lamb." The trial proceeded on the theory that the receipt and the endorsement were to the same effect: that Lamb was pretending in each instance to act in the capacity of authorized agent. Held: no forgery. "The reason is [152 SE at 156] that forgery cannot be predicated of a writing not intended to be a semblance of something which it does not purport to be and which is in itself not false.")

OKLAHOMA

*Ex Parte Offutt*, Okl. Cr. App., 234 Pac. 222 (1925) (Check signed by petitioner as agent of a firm. Held: not forgery, citing and quoting from *State* v. *Taylor*, 46 La. Ann. 1332, 16 So. 190 and *People* v. *Beidit*, 111 Cal. 274, 43 P. 901.)

*Schulte* v. *State*, 41 Okla. Cr. 173, 271 P. 1045 (1928) (stock certificate was signed

"R. Bess, President

"S"

The Court held there was no forgery [271 P. at 1048]: "It is also immaterial as to whether or not he signed the name of R. Bess, the president of the company, with or without his authority. When he signed the name of R. Bess as president and placed his initial 'S' under it, he was thereby showing his agency. The certificate shows to have been executed by the agent, and we hold that it did not purport to be an instrument executed by R. Bess as president of the gin company; . . . ")

TENNESSEE

*Mallory* v. *State*, 179 Tenn. 617, 168 S.W. 2d 787 (1943) (The endorsement on the check was: "Labor Advocate, by P. T. Mallory." Held: not forgery).

TEXAS

*Simms* v. *State*, 116 Tex. Cr. 97, 32 S.W. 2d 852 (1930) (Check signed "R.C. Simms, by George Simms." Held: No forgery. [32 S.W. 2d at 853]: "While one who signs to a document the name of another by himself as agent thereby creates an instrument which, if used to defraud, might subject him to prosecution for swindling, we do not think such document can be the subject of forgery by the said agent.")

WASHINGTON

*Dexter Horton National Bank* v. *United States Fidelity & Guarantee Co.*, 149 Wash. 343, 270 P. 799 (1928) (checks made out to his employer were unauthorizedly endorsed: "Crenshaw & Bloxom, H.N. Howe, Cashier." Held: not forgery [270 P. at 801]: "the act of Howe in endorsing the words above quoted upon checks payable to his employer

did not constitute forgery either within any technical definition of the word or its popular meaning.") [10]

From the above resume it is seen that petitioner was not guilty of forgery. The jury should have been so instructed. The court below should have been reversed.

## II

### Petitioner Was Denied Due Process of Law Because He Was Convicted and the Conviction Affirmed in the Absence of Evidence.

Although there is pending before this Court on this writ only two counts involving but a single question of law, there were pending before the trial court 35 counts and before the court below 31 counts involving many factual situations and questions of law. The case before the courts below is an example of how, where there are such a multitude of issues, facts and documents, the issues on any single count become blurred and resulted, as we will show, in confusing the various counts and of convicting on one count (here, two, Counts 21 and 22) because of the evidence and charge of other counts (Cf. *United States* v. *Bufalino*, 285 F. 2d 408 [CA 2 1960]). The conviction in this case is no more supportable—because of the lack of evidence—than were the convictions in *Thompson* v. *Louisville*, 362 U.S. 199 and *Garner* v. *Louisiana*, —— U.S. ——, 30 U.S. Law Week 4070. Here as there, the conviction violates due process of law.

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[10] The case is of additional interest to the instant case because the argument was made that since there were no words of procuration immediately before Howe's name the representation was that the first signature was genuine and not written by Howe. The court rejected the argument, saying (270 P. at 801): "(T)he situation is the same as though Howe had added the word 'by' before his name and the word 'its' before the word 'cashier', or written other words of similar import. The presence or absence of words of procuration has nothing to do with the question of whether or not the words written by Howe constituted forgery."

In its original opinion (see R. 127; 115-116) the court below said:

> "The jury was correctly instructed that a written power of attorney to prosecute a claim against the government and giving authority to an agent to *receive* a check, gives that agent no power to *endorse* and *collect* the check. Such authority may be given either orally or in writing. . . .
>
> "There being no proof of such authority in writing, appellant must rest on an oral authority to sign as Trustee, and realize upon the checks. Appellant claims he had this. Such authority was denied by both Bartfields. At best this presents a question of credibility, decided adversely to appellant below, and this evidence must be looked upon by us, on this appeal, in the light most favorable to support the government's case here. . . ." (Emphasis in original.)

When, on petition for rehearing, it was called to the attention of the court below that there was a written power of attorney and that it *expressly* gave the right to receive, deposit and endorse the checks, the court amended its opinion (R. 127) by inserting the words "adequate or convincing" between the words "no" and "proof".

How the court could arrive at this conclusion in the face of the clear language of the power of attorney is not easily understood. But pass that; the misunderstanding by the court below and its confusing of Counts 21 and 22 with other counts in the indictment is clearly seen from this statement (R. 128):

> ". . . If there were only evidence that appellant had acted solely in good faith and not fraudulently as Trustee, he might now be heard to claim his signing as Trustee was actually an act done pursuant to the

> power of attorney he held. But we cannot and do not so interpret his action, in view of the *substantial evidence to support the fraudulent returns* which were the basis of the refunds which resulted in the issuance of the checks upon which Counts 21 and 22 were based." (Emphasis added.)

There is simply nothing—but nothing—to support this statement and such a view of the evidence.

In the first place, petitioner was not charged with filing a fraudulent return for the Bartfields. In the second place, the Government never *claimed* and there is no claim that the Bartfield returns were fraudulent. In the third place, the tax returns are not in evidence and were not even offered in evidence (R. 89, 97).[11] In the fourth place, there just is no evidence *at all*, substantial or otherwise, that the Bartfield tax returns were fraudulent. The entire evidence on the Bartfield counts appears in the record from pages 41 through 49. Nowhere therefrom can there be gleaned even a whisper—not a scintilla—that the tax returns were incorrect, or that petitioner had acted fraudulently or that petitioner was not entitled to the money.

On what ground, therefore, can such a conviction be allowed to stand? If the court below made so basic an error, one can imagine the problems of the jury.[12]

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[11] As to some of the other forgery and false representation counts, the Government offered the tax returns, e.g. Exhs. 10 & 11 (R. 33, 34, 53); Exh. 15 (R. 35, 37); Exhs. 17 and 20 (R. 38, 39); Exhs. 18 & 21 (R. 40, 53); Exh. 27 (R. 51); Exh. 28 (R. 52). The Bartfield returns were marked for identification as Exhibits 33 and 34 (R. 41) but not offered (R. 50, 89, 97).

[12] Especially in the light of the instruction (R. 75) to the jury that a written power of attorney to *receive* a check gives no power to endorse and collect a check—all in the face of the precise language of Exhibit M (R. 44, 106-107) giving *precisely* the power to endorse and collect.

Other errors by the court below are equally bad. The court makes a point (R. 127) that the power of attorney (Exhibit M, R. 44, 106-107) authorized "R. Milo Gilbert" to endorse and negotiate the checks, but that it does not say anything about "R. Milo Gilbert, Trustee". What possible difference could that make? If the word "by" appeared in front of "R. Milo Gilbert" on the endorsement and the word "Trustee" had been left off so that the endorsement read: "Bartfields by Gilbert", would there have been any less a forgery? We submit not. Nor does the addition of the word "Trustee" either with or without the "by", make it any more a forgery. It is not forgery in either case. With the "by" present, the word "Trustee" becomes just surplusage.[13] Without "by", the word "Trustee" likewise shows that the writing is Gilbert's, not Bartfields', and therefore not forgery.

The court below states (R. 128) that the Bartfields testified that their signatures were not notarized, although it did concede (*ibid.*) that the Bartfields affirmed that the signatures were theirs. Again, what difference does it make whether the signatures were notarized?[14] There is no requirement in California that a power of attorney be acknowledged. The only effect of acknowledgment is that, if acknowledged, the instrument may be recorded (Calif. Govt. Code 27287) and thus give constructive notice to others (Calif. Civil Code 1213). But there is no require-

[13] So as to facilitate the bank clerks in determining into which account to deposit the check (R. 55, 58, 63).

[14] Incidentally, the place on the power of attorney form is what is known as an acknowledgment which is a statement by a notary that the persons acknowledged *having executed* the instrument (Calif. Civil Code 1185). It is not, like a verification (Calif. Code of Civil Procedure 446) or an affidavit (Calif. Code of Civil Procedure 2003), a statement under oath and signed in the presence of a notary.

ment that to be valid a power of attorney need be recorded.[15] And an unrecorded (Calif. Civil Code 1217) or an unacknowledged (*West* v. *Mears*, 17 Cal. App. 718, 121 Pac. 700) instrument is valid between the parties. Moreover, there is no contention that the power of attorney here involved was recorded and the instrument shows on its face that it was not.

There are other statements by the court in its effort to sustain the conviction which likewise do not support it. These statements are (R. 128) that the jury might have found:

1. that the signatures of the Bartfields on the power of attorney were forgeries. We respectfully submit that when a person affirms that a signature is his, it cannot be a forgery.

2. that the power of attorney was unnotarized and incomplete before delivery. Even if unnotarized, as we have pointed out above, that is utterly immaterial. And to suggest that the instrument was incomplete before delivery is without foundation in the record. It is just a guess, hardly enough to sustain criminal conviction.

3. that the instrument was executed in blank. Here again, there is just no evidence to support such a conclusion.

4. that it was executed with no specific power to endorse checks on the theory that the provision for endorsement was inserted *after* the original drafting by use of a caret. There is just no evidence to support the conclusion that

[15] This is true even if the power of attorney concerns real property (Calif. Civil Code 1216).

the insertion of the word "endorsing" occurred after the original drafting.[16]

If the jury drew these conclusions, as the court below said it might (R. 128), then, in truth the convictions were made out of thin air—by guess and speculation—not by evidence. "Speculation and intuition cannot be substituted for proof." (*United States* v. *Pechenik*, 236 F. 2d 844, 847 [CA 3 1956]).

This is truly a case where injustice has been done and a mistake made (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395). It is obvious (R. 109) that the court below had little sympathy for petitioner.[17] But that is neither here nor there. The conviction was obtained in the absence of evidence and so is a denial of due process calling for correction by this Court. *Thompson* v. *Louisville*, 362 U.S. 199, 206:

> ". . . Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a viola-

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[16] What evidence there is on this matter is the testimony of petitioner. (It will be noted that, to make crystal clear the absence of evidence to support the conviction, petitioner has not relied at all upon the evidence he introduced in putting on his case.) R. 60:

"Q. When did you put this writing on this power of attorney?

"A. At the time I prepared it.

"Q. When was that?

"A. April 10, '57.

"Q. When did you insert the little word 'endorsing'?

"A. At the precise time after I wrote it. I wrote it and I read it and put that in."

Even if the word "endorsing" were not in the power of attorney, the remaining language (R. 106) ("receiving, depositing . . . and otherwise negotiating such refund checks at his sole discretion, including the right of offset") is certainly broad enough to authorize the endorsement.

[17] It even thought he was guilty of the counts as to which the jury had acquitted (R. 109).

tion of due process to convict and punish a man without evidence of his guilt."

## Conclusion

The convictions on counts 21 and 22 should be reversed and the counts ordered dismissed.

Respectfully submitted,

ALBERT A. DORN
WIRIN, RISSMAN, OKRAND & POSNER
FRED OKRAND
*Attorneys for Petitioner*